Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 76-1048

75.81 ACRES OF LAND, MORE OR LESS,
SITUATE IN GRAYSON COUNTY,
VIRGINIA, CLYDIE JOHNSON,
ET UX, ET AL,

V. Petitioners

UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO: _____

75.81 ACRES OF LAND, MORE OR LESS,
SITUATE IN GRAYSON COUNTY,
VIRGINIA, CLYDIE JOHNSON,
ET UX, ET AL,

PETITIONERS

v.

UNITED STATES OF AMERICA,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT:

The Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 2, 1976.

OPINIONS BELOW

The United States District Court for the Western District of Virginia rendered an Order, set forth in the Appendix, infra, at pp 32-38, overruling the Exceptions and Objections filed by the Petitioners to the commissioners' Report filed with the district court, and adopting, ratifying, and confirming the commissioners' Report with regard to the payment of just compensation for a condemnation by the Respondent of the estate of the Petitioners.

The United Court of Appeals for the Fourth Circuit entered an unpublished Opinion in the case of United States of America v. 75.81 acres of land, more or less, situate in Grayson County, Virginia, Clydie Johnson, et ux, et al, No. 76-1029, on November 2, 1976, a copy

of which is set forth in the Appendix to this petition, infra, at pp 38-42.

JURISDICTION

The jurisdiction of the United States Court of Appeals for the Fourth Circuit rests upon 28 U.S.C. § 1254.

QUESTION PRESENTED

1. Whether a compromise award by a commission in a land condemnation case pursuant to federal law meets the requirements set forth by this Court in the case of United States v. Merz, 376 U.S. 192 (1964), when the report does not show any basis or rationale for the compromise award?

STATEMENT OF THE CASE

Clydie and Beatrice Johnson were the owners of approximately 75 acres of land in Grayson County, Virginia,

the land being located in the beautiful Fairwood Valley region within sight of Mt. Rogers, the highest peak in the State of Virginia. In May, 1966, Congress passed the Mt. Rogers National Recreation Act, 16 U.S.C.A. §460R, et seq, which provided the authority for the expansion of the Jefferson National Forest and for the establishement of the Mt. Rogers National Recreation Area. The Johnsons' land was among the additional 7000 acres determined by the United States Forest Service as being necessary for the creation of this new recreational site.

On April 17, 1974, the United States filed a Complaint and Declaration of Taking the United States District Court for the Western District of Virginia against Tract No. 2050 owned by Clydie and Beatrice Johnson. On the same date,

the District Court entered an order granting the judgment on the Declaration of Taking, vesting ownership of the tract in the United States and requiring the Johnsons to surrender their property. The sum of $25,000 was deposited by the government in the registry of the court, representing the government's estimation of just compensation to the Johnsons for their estate. On April 25, 1974, formal notice of the Complaint and Declaration of Taking was issued, specifying that the Defendants had 20 days in which to answer and to present any objections of defenses to the taking of their property. On May 30, 1964, the Defendants filed a Motion to Dismiss and a Motion to Vacate the Declaration of Taking, said motions later being overruled by the trial court.

On August 22, 1975, the District Court entered an order

establishing that the issue of just compensation for the property condemned would be determined by a commission, pursuant to Federal Rule of Civil Procedure 71(A)(h). The Court then appointed three individuals to serve as commissioners, overruling the government's request that the matter of just compensation be determined by a jury. The commissioners so appointed convened, reviewed the property in question, heard evidence on behalf of both parties, and on December 22, 1975, filed their report with the court. It is the adequacy of the commissioners' report which frames the issues in this appeal. The report is set forth in the Appendix, at pp 25-32. This report merely states that the commissioners met together with the parties and their counsel, took a view of

the property, and heard the evidence in the case, all having been completed in two days. The report contains a very brief recitation of the evidence, giving a description of the number of acres, road frontage and timbered area. It recites that all the witnesses had testified that the highest and best use of the property was of recreational purposes, then set out comparable sales of mountain tracts in terms of dollars per acre as expressed by the witnesses for both parties. The report ends with a one sentence recitation of the amount of the award, $52,500.

Despite the timely objections and the exceptions of counsel for the landowners, the report was adopted by the District Court in the final order from which appeal to the Court of appeals

below was taken.

REASONS FOR GRANTING CERTIORARI

1. The importance of the question.

There are thousands of acres of land in the Western District of Virginia yet to be condemned under the authorization of the Mt. Rogers National Recreation Act, 17 U.S.C.A. §760R, et seq. Many of the tracts yet to be condemned and large amounts of the remaining acrage are owned by poor mountain families with very limited economic mobility, almost no sophistication in legal issues and family roots that go deep into the mountains of southwestern Virginia. Clydie and Beatrice Johnson, the Petitioners, are the embodiment of these rugged mountain folk, whose lives are tied to their beloved mountain land emotionally,

economically, and sociologically. The purchase of comparable land in the mountains of southwestern Virginia by these landowners after condemnation of their tracts by the government is extremely difficult even with very favorable awards for their land, because of the spiralling costs of land in this part of the country. This problem is exacerbated to the point of impossibility if the awards for the condemnation of their land are not fair and reasonable.

The decision in the District Court below in this case allows the commissioners to roam at will between the two poles of appraisal testimony of the experts for the government and the landowner, respectively, regardless of the breadth of the gulf between them, without any justification or explanation of their

ultimate decision on the award to be made.

In this case, the commissioners were considering testimony placing the value of the land at amounts varying from a low of $37,000 to a high of $97,500. The commissioners selected the figure of $52,500, without any suggestion as to whether they reached that figure by some logical process of the evaluation or whether they simply pulled the figure out of a hat.

If this case law is allowed to stand in the Western District of Virginia, potential economical disaster lies ahead for hundreds of landowners in southwestern Virginia alone.

These rugged mountain people have indicated time and again that their land is not for sale at any price, to the U.S. Government or anyone else. However, by an act of Congress, "progress" must

take priority over the strong ties of these mountain people to their land. However, this Court must assure that the clear intent of Congress as interpreted by the Court in the Merz decision is carried out in order to allow these land owners to find comparable land which can be purchased with the proceeds of the condemnation of their original property.

2. The Commissioners' report fails the Merz test.

This Court has set forth explicit guidelines for measuring the adequacy of the commission's report in condemnation proceedings. The landmark case in this area is United States v. Merz, 376 U.S. 192 (1964), in which the court made the following observation about the use of commissions:

> The use of a commission to resolve the issue of just compensation is justified by the facility with which commissioners may inspect the property in a likelihood that uniformity of awards may be realized expeditiously. At the same time, there is danger that commissioners, unlike juries, may use their own expertise and not act as a deliberative body applying constitutional standards. A jury, until it retires, sits under the direct supervision of the judge, who rules the admissibility of evidence, who sees that the witnesses are properly qualified as experts, and who polices the entire hearing, keeping it within bounds. Then, in due course, the judge instructs the jury on the law, answering any inquiries its members may have on the law. The jury is under surveliance from start to finish and subject to judicial control. Hence, its general verdict that the land is worth so many dollars is not overturned for lack of particularized findings.

376 U.S. at 197.

Mr. Justice Douglas, writing for the court, continued by outlining problems with the use of commissions, as opposed to the use of juries. He pointed out that the judge who uses commissioners creates "a tribunal that may become so free-wheeling, taking the law from itself, unless subject to close supervision." 376 U.S. at 198. The court went on to stress the importance of carefully instructing the commissioners on the law. Mr. Justice Douglas then set forth the often quoted standard used in reviewing commissioners' reports, as follows:

> Conclusory findings are alone not sufficient, for the commission's findings shall be accepted by the court 'unless clearly erroneous'; and conclusory findings as made in these cases are normally not reviewable by

> the standard even when the District Court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence. See United States v. Lewis, 308 F.2d 453, 458.

376 U.S. at 198.

According to Mr. Justice Douglas, the "path followed by the commissioners in reaching the amount of the award can be distinctly marked," 376 U.S. at 199 (emphasis added), with the theory being that the commissioners "will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it." Ibid. (emphasis added)

A brief examination of the commissioner's report in this case (Appendix, pp 25-32) will reveal how

grossly defective it is under the Merz guidelines. The first page of the report simply recites the fact of the viewing of the property and a hearing of the evidence from the parties. The evidence is then summarized with a one paragraph description of the property, giving only the barest of details. There appears a brief dollar-per-acre description of comparable sales introduced by the parties, a flat statement of highest and best use and a mere recitation of the amount of the award.

The report states that there was no conflict in the testimony that the highest and best use of the property was for recreational purposes, but no reasons are given to support the conclusion or references as to what types of recreational purposes were contemplated.

There is no mention as to whether the land would be good for skiing, hiking, hunting, fishing or development of camp sites for second home mountain retreats. There is nothing in the report to indicate whether the commissioners considered the scenic values or absence of scenic appeal or the effect these considerations would have on the evaluation of the property.

There is absolutely no evaluation of the evidence given by government witnesses of comparable sales of mountain tracts. The report simply points out that the estimates in evaluation of the government's comparables range from $294 per acre to $558 per acre, specifying that one government witness placed the value of the land taken at $39,200, whereas the other

government witness valued it at $37,900. The report says that a third government witness testified only "that the price of land reflects the market value of timber", but the amount of this market value was never given in the report. There is absolutely no discussion in the report as to what weight the commission attached to this evidence. It does not point out where these comparable tracts were located, whether they are similar in description to the property involved, whether they have more or less timber, whether they contained similar road frontage or even whether they would be used for the same kinds of recreational purposes contemplated for the Johnson land.

Similarly, the evidence presented by the landowner was given

summary treatment in the report, in which one sentence was used to state that the landowners and their witnesses testified as to the land's value and presented evaluations of the tract on the date taken which ranged from $92,000 to $97,500.

Although there appeared this gross discrepancy in evaluations between the witnesses for the parties, there was no attempt in the report to describe the commissioners' rationale in choosing the figure of $52,500 as the value of the land taken. It is obvious that they reached some kind of compromise and gave greater weight to the testimony of some witnesses than to others; yet from the record, there is virtually no way of ascertaining "what path the commissioners took through the maze of conflicting

evidence." United States v. Merz, supra, at 198.

3. There is a split in the Circuit Courts.

The result in this case in the District Court below, as affirmed by the Fourth Circuit Court of Appeals, creates a split in the circuits requiring resolution by this Court. There have been numerous cases where other circuit courts of appeal have found commissioners' reports defective under the Merz standards. See Precter v. United States, 400 F.2d 124 (5th Cir. 1968); Government of Virgin Islands v. 2.6912 Acres of Land, 396 F.2d 3 (3rd Cir. 1968); United States v. Bell, 363 F.2d 94 (8th Cir. 1966); United States v. 2,477.79 Acres of Land, 259 F.2d 23 (5th Cir. 1958).

Recitation of one of the aforementioned cases illustrates the disparity. In Government of the Virgin Islands v. 2.6912 Acres of Land, supra, in the Third Circuit Court of Appeals, the commissioners initially filed a report which consisted of a short paragraph which purported to explain their manner of arriving at the evaluation of the tracts of land involved. This paragraph was accompanied by a recitation that the commission had conducted hearings, visited the premises, and had listened to the government appraisal, the witnesses, the attorneys, and the owners, taking into consideration all of the factors presented. The report specified that the commission had considered the lowest and highest sale prices of the properties in the area during the past

years, and, after a full discussion, arrived at the values submitted in the report. The report was challenged under the Merz standard by both parties. The district court ordered the commissioners to prepare and file a supplementary report containing their findings of facts and conclusions of law and requiring, futhermore, that the commissioners answer a number of interrogatories designed to elicit exactly what evidence the commissioners were relying upon and the manner in which they had reached their final evaluations.

A final amended report was filed subsequently, responding to the courts interrogatories but not charging any of the prior evaluations. There were objections again by the parties involved, but this time the court

overruled the objections and affirmed and adopted the amended report.

On the finding that the report failed miserably under the Merz standard, the Third Circuit pointed out that the commissioners' answers to the judge's interrogatories did not reveal the commissioners' reasoning in fixing their evaluations. 396 F.2d at 5. When asked what elements of evidence were considered and utilized by the commission in arriving at its findings, the commission simply replied that they considered "all evidence offered at the hearing" and that "some was accepted and some rejected." Ibid. When the commissioners were asked which expert testimony was relied upon or rejected, the commissioners responded that they had relied "mainly on its knowledge and experience in real estate

negotiations and information gathered in various transactions," adding that "[a]ll testimony was given just consideration and [they] did not rely on any specific witness or expert." Id. Under such circumstances, the Third Circuit concluded that the commissioners had fallen "into the trap, suggested in Merz, of using their own expertize and not acting like a deliberative body applying constitutional standards." Id. The court went on to conclude that the award could not be upheld even though they were within the limits of testimony presented to the commission.

In the case at bar, the commissioners did not even go as far as stating that some of the evidence was rejected and some was not. Accordingly, it can only be concluded that, as in

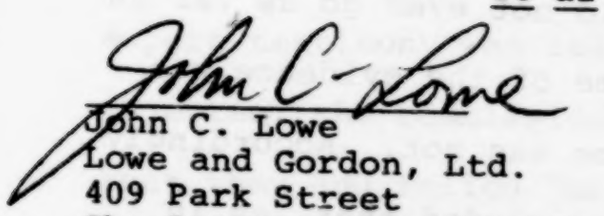
Government of Virgin Islands, supra, the commissioners in this case simply relied upon their own expertise rather than apply constitutional standards in reaching their final award figure. The result in this Fourth Circuit case is irreconcilable with the result in the Third Circuit.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted.

Respectfully submitted,

CLYDIE JOHNSON, et ux,
et al



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January 31, 1977

APPENDIX

I. REPORT OF THE COMMISSIONERS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA, Plaintiff	*	
vs.	*	CIVIL ACTION NO. 76-106-A
75.81 ACRES OF LAND, SITUATE IN GRAYSON COUNTY, VIRGINIA, CLYDIE JOHNSON, ET UX, ET AL, Defendants	*	TRACT NO. 2050

COMMISSIONER'S REPORT

TO THE HONORABLE TED DALTON, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA:

Your undersigned Commissioners were duly appointed by Your Honor by Order entered in the above-styled case

on the 21st day of August, 1975, to ascertain and report what sum will be a just compensation for the condemnation by the Plaintiff of the estates and interests taken by the Plaintiff for public use in the above-styled case among others, to-wit: "the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines."

On August 28, 1975, your Commissioners, with counsel and representatives of the government and the landowners went upon and examined the property described in Tract No. 2050 and the exterior boundaries thereon were pointed out to us and the improvements thereon were inspected. That afternoon we met in the United States District Courtroom in Abingdon, Virginia, with

counsel and representatives of the government and the landowner present and were then sworn by Linda S. Wood, Deputy Clerk of the United States District Court, Western District of Virginia, as can be seen from her certificate herewith filed with the papers in this cause. Thereafter, your Commissioners began to hear evidence in the case and the same was completed the following day.

EVIDENCE

The evidence shows this tract of land to be a tract containing 75.81 acres of land with a small cabin construced thereon situated on State Route 603 approximately 4.5 miles west of Troutdale, Virginia. The land fronts on State Route 603 for approximately 1,300

feet. The land extends southeast from State Route 603 from an elevation of approximately 3,500 feet to an evaluation of approximately 4,000 feet. The Lewis Fork of Fox Creek runs through the property and there are three good graded roads through the property. Approximately 65 acres of the land is wooded land with approximately 10 acres near the road open. All witnesses testified that the highest and best use of the property was that of recreational purposes. The government introduced three witnesses, two of which introduced comparable sales of mountain tracts which varied in range from TWO HUNDRED NINETY-FOUR and NO/100 ($294.00) DOLLARS per acre to FIVE HUNDRED FIFTY-EIGHT and NO/100 ($558.00) DOLLARS per acre, and placed a total value of the land taken at THIRTY-NINE

THOUSAND TWO HUNDRED and NO/100 ($39,200.00) DOLLARS and THIRTY-SEVEN THOUSAND NINE HUNDRED and NO/100 ($37,900.00) DOLLARS. The third government witness testified only that the price of land reflects the market value for timber. The landowner and three witnesses testified as to the value of the land and presented values of the tract on the dates taken and a range from NINETY-SEVEN THOUSAND FIVE HUNDRED and NO/100 ($97,500.00) DOLLARS. Your Commissioners were then presented with instructions prepared by the landowner and the government without objection which are herewith filed as a part of this report and marked Exhibit #1.

Upon this evidence, the instructions, and our view of the subject tract and the comparables, your

Commissioners agreed upon FIFTY-TWO THOUSAND FIVE HUNDRED and NO/100 ($52,500.00) DOLLARS as the value of the land taken of this Tract #2050 as of April 17, 1974, and for our chairman to prepare a report, and after considering a report prepared by the chairman, the same was approved.

AWARD

We, therefore, determine the value of Tract No. 2050 at the time of the taking at FIFTY-TWO THOUSAND FIVE HUNDRED and NO/100 ($52,500.00) DOLLARS and award as a just compensation therefor the sum of FIFTY-TWO THOUSAND FIVE HUNDRED and NO/100 ($52,500.00) DOLLARS.

Respectfully submitted,

This 10th day of September, 1975.

/s/James T. Ward
JAMES T. WARD,
CHAIRMAN

/s/Hugh S. Calhoun
HUGH S. CALHOUN

/s/C. B. Waddell
C. B. WADDELL

We further certify the cost of the proceeding before us and the expenses incurred by each are as set forth and marked as Exhibits 2, 3, and 4.

EXHIBIT #2

(1)	James T. Ward, Chairman	2 days*
(2)	Mileage	175 miles
(3)	Expenses - meals	$62.00
(4)	Preparation of report	$100.00

*Note: I was advised to be at the view on Wednesday, the 27th at 9:00 A. M. and came to the view only to be advised that the view had been postponed and that the parties had been unable to

contact me regarding the postponement.

EXHIBIT #3

(1)	Hugh S. Calhoun	1 day
(2)	Meals and expenses	$29.20
(3)	Mileage	242 miles

EXHIBIT #4

(1)	C. B. Waddell	1 day
(2)	Expenses - meals and lodging	$48.10
(3)	Mileage	164 miles

II. ORDER OF THE TRIAL COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ABINGDON

UNITED STATES OF AMERICA, *
*
Plaintiff *
*
v. * O R D E R
*
*

75.81 ACRES OF LAND IN * CIVIL ACTION
GRAYSON COUNTY, * NO. 76-106-A
VIRGINIA, CLYDIE *
JOHNSON, ET UX, ET AL, * TRACT NO.
* 2050
Defendants *
*

Upon the Report of the Commissioners filed September 22, 1975, expressly incorporated by reference herein, the Court finds as follows:

(1) On April 17, 1974, this Court entered judgment on the Declaration of Taking that the United States of America was as of April 17, 1974, vested with title to the estate therein described in that property designated as Tract No. 2050.

(2) These proceedings have been conducted according to law; this Court has jurisdiction of the parties and of the subject matter; and the United States of America has the right to condemn

the said estate for the public use.

(3) The Commissioners appointed by this Court met and viewed the property, heard evidence in behalf of the plaintiff and defendants, and by their Report filed herein, determined the sum which constituted just compensation for the condemnation of the estate in this property in the amount set forth.

IT IS, THEREFORE, ADJUDGED and ORDERED that:

1. The United States of America has the right to condemn for the public use the said estate in the property designated as Tract No. 2050, and title thereto was vested in the United States as of April 17, 1974, above set forth.

2. The Exceptions and Objections filed by the landowners be, and they hereby are, overruled.

3. The Report of the Commissioners be, and it hereby is, adopted, ratified and confirmed as to this parcel and the interest therein; and the following sum be, and it hereby is, established as just compensation for the plaintiff's condemnation of the said estate therein, to-wit: FIFTY TWO THOUSAND, FIVE HUNDRED AND NO/100 DOLLARS ($52,500.00).

And it being represented to the Court that the sum of $25,000.00 has been deposited heretofore in the registry of the Court by the United States of America as estimated compensation for the property taken in this proceeding and described hereinabove.

IT IS FURTHER ADJUDGED and ORDERED that the United States be, and it hereby is, required to pay into the registry of this Court as the deficiency between the sum heretofore paid into the registry and the amount herein established as just compensation the sum of $27,500.00, with interest thereupon at the rate of 6% per annum from April 17, 1974, until the date of payment of said sum into the registry.

IT IS FURTHER ORDERED that upon payment of said deficiency into said registry, the Clerk shall forthwith without the further Order of this Court draw a check in the total amount of the funds on deposit in the registry of this Court to the credit of this tract. Said check shall be made payable to Clydie Johnson, Beatrice Johnson and

John C. Lowe, Esq., and the Clerk will mail said check by certified mail, return receipt requested, to John C. Lowe, Esq., Lowe and Gordon, Ltd., 1111 West Main Street, Charlottesville, Virginia, 22903. The Clerk will certify a copy of this Order to the official depository of this Court which shall be its sufficient authority to honor said check when duly presented.

The Clerk shall furnish a certified copy of this Order to John C. Lowe, Esq., counsel for the defendants, and five certified copies to Carr L. Kinder, Jr., Assistant United States Attorney, P.O. Box 1709, Roanoke, Virginia, 24008.

Immediately upon disbursing the aforesaid sum of $27,500.00, plus interest, the Clerk shall mark the judgment

satisfied and dismiss this case from the docket and place it among the causes ended.

ENTERED this 31st day of October, 1975.

/s/ James C. Turk
District Judge

III. UNPUBLISHED OPINION AND DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOUR THE FOURTH CIRCUIT

NO. 76-1029

UNITED STATES OF AMERICA, Appellee,

versus

75.81 ACRES OF LAND, more or less, situate in Grayson County, Virginia, Clydie Johnson, et ux, et al, Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. James C. Turk, District Judge.

Submitted: April 29, 1976
Decided: November 2, 1976

Before HAYNSWORTH, Chief Judge; FIELD, Senior Circuit Judge; and WIDENER, Circuit Judge.

John C. Lowe, Edward L. Hogshire, Lowe and Gordon, Ltd., on brief for the Appellants. Glen R. Goodsell, Attorney United States Department of Justice; Carr L. Kinder, Jr., Assistant United States Attorney, for the Appellee.

PER CURIAM:

On April 17, 1974, the United States filed a complaint and declaration of taking against 75.81 acres of land located in Grayson County, Virginia. The owners of the property, Clydie and Beatrice Johnson, moved to vacate the

Declaration of Taking, and the Motion was denied. Pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure, three commissioners were appointed to determine just compensation for the condemnation of the property. The district court adopted their findings. It is from their determination that the Johnsons now appeal.

A review of the record discloses that the commissioners met on August 28, 1975, and in the company of the landowners' representative, inspected the land; they also heard sworn testimony as to the value of the property. The Johnsons urge that the commissioners in their report failed to describe adequately the land which they inspected or to sufficiently catalogue the evidence upon which they based their decision.

The report, which the district court adopted in toto, contained a description of the appearance of the land and its watercourses, the character of its terrain, its frontage upon a state route, and its other available access roads. It stated that all witnesses were in agreement as to the optimal use of the land, i.e., for recreational purposes. Fair market value was determined after testimony of comparable sales of mountain tracts, and after estimates were offered by three governmental witnesses and by the land owner. The price ultimately agreed upon fell within the lower and upper estimates. This total price, although its basis was not fully disclosed, was well within the range of testimony adduced before the commission, and we cannot say that the ommission renders

the report fatally defective. See United States v. Certain Parcels of Land, etc., 384 F.2d 677 (4 Cir. 1967), applying United States v. Merz, 376 U.S. 192 (1964).

Accordingly, we dispense with oral argument and affirm the judgment of the district court.

A F F I R M E D.